IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18/03/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice F.M. IBRAHIM KALIFULLA

W.A. No.1026 of 2002 and W.A.No. 1027 of 2002

M/s. P.T. Sumber Mitra Jaya
Chennai .... Appellant

-Vs-

The National Highways Authority of India
(Ministry of Road Transport and Highways)
New Delhi .... Respondent

Appeals under Cl.15 of the Letters Patent against the
common order dated 28-2-2002 made in
W.P. Nos.23360 and 23361 of 2001

!For Appellant :: M/s. R. Krishnamoorthy
R. Muthukumaraswamy
Senior Counsel for
Mr. Irwin Aaron

^For Respondent :: Mr. V.T. Gopalan
Senior Counsel/Additional
Solicitor General for
Mr. Vijay Narayanan

:JUDGMENT

V.S. SIRPURKAR, J.

This judgment will dispose of the above two writ appeals, viz.
W.A. No.1026 and 1027 of 2002. Both these writ appeals emanate from a common judgment, disposing of W.P. Nos.23360 and 23361 of 2001. In W. P. No.23360 of 2001, the petitioner/appellant herein had challenged an order dated 31-10-2001, debarring the appellant from participating in any tender process, including the re-invitation of bids in view of the non-adherence to conditions of contract by the appellant. In short, the appellant was informed that it was □black-listed□. In W.P. No.23361 of 2001, the appellant had challenged the order dated 22-10-2 001 whereby, the bidding process in respect of the

project 4-laning of km.163.00 to km.180.00 of Bangalore-Salem-Madurai Section through Thoppur Ghat of NH-7 State of Tamil Nadu under the contract package No.NS-25(TN) was cancelled. The following facts will help to understand the controversy involved:

2. The appellant is an Indonesian company, primarily engaged in road construction industry in many parts of the world, including India while, the respondent, viz. National Highways Authority of India (in short □NHAI□) is an authority constituted under the National Highways Authority Act, 1988 for the development, maintenance and management of highways and matters connected therewith or incidental thereto. It is the case of the appellant that for effecting the developments in the National Highways in India, competitive pre-qualification bids are invited on various projects by the respondent by publication of notices in leading dailies and on examination of the documents submitted, the respondent selects the qualified bidders and they are called upon to submit another bid consisting of technical and commercial nature. After the examination of technical bids, commercial bids are opened and processed by the respondent and the contract is awarded to the bidder whose bid is substantially responsive to the bidding documents and is acceptably lower.

3. Some works were undertaken by the appellant for converting the National Highway Bangalore-Salem-Madurai Section through Thoppur Ghat (NH-7) km.156 to km.163.4 into 4-lanes highway, at a cost of Rs.22,0 5,19,217/-, under the contract package No.NS-14(TN). While the appellant was so working and completing its contract in June, 1999, the respondent invited pre-qualification bids for the award of contract under Phase II programmes of North-South and East-West corridors by issue of a publication of notices in leading dailies. Pursuant to the said invitation, the appellant submitted its bid with respect to contract package Nos.NS22 (MR) and NS 25(TN). Here we are concerned with NS-25 TN alone which pertains to 4-laning of km.163.0 to km.180.0 of Bangalore-Salem- Madurai Section of NH-7 under Contract Package No.NS/25(TN). In short, while the appellant was completing the work in the section of km.156 to km.163.4 under the Contract Package No.NS-14(TN), the appellant also competed for the aforementioned work under Contract Package No.NS-25 which pertained to km.163.0 to km.180.0.

4. The further case of the appellant is that after the due examination of the documents, the respondent informed the appellant that it was pre-qualified for bidding in respect of this contract and on submission of technical and commercial bids, the respondent informed the appellant that its□ bid with respect to the aforesaid contract was the lowest and it was required to meet the Chief General manager of the respondent on 21-3-2001. After this meeting, by communication dated 24-4-2001, the appellant was asked to make a presentation on 27-4-20 01 regarding the methodology and mobilisation of resources for execution of the work with respect to this bid and another bid also (with which we are not concerned). However, since the finalisation of the grant of the award was delayed, the appellant, on causing enquiries, came to know that a letter was written by a Member of Parliament in April, 2001 to the Chairman of the respondent, the copy of which was made over to the Minister of Road Transport and Highways, Government of India, complaining

about the slow progress of the work which was then going on under Contract Package No.NS-14. There was also a complaint that the appellant was sub-contracting the contracts without the approval of the respondent.

5. It is then claimed by the appellant further in the writ petition that another letter was also written by the same Member of Parliament in May 2001 to the said Minister, marking a copy thereof to the respondent, complaining that though the appellant had contravened the terms and conditions of the contract with respect to Contract Package No.NS-14(TN), the respondent still proposed to award the contract in favour of the appellant by evaluating its bids as the lowest bids.

6. The appellant then pleaded that under Contract Package No.NS-14 (TN), the work was to be done through the Reserve Forest area in Thoppur Ghat section, which was a hazardous area. The delay was caused because of the time taken in obtaining the permission of the Forest Department to begin the work as also for removal of encroachments on the road margins, electricity posts and transformers of the Electricity Department and the telephone poles of the Telephone Department. It was further pointed out that the appellant with an intention to complete the work within the stipulated period, secured the services of a company called M/s.Capital Equipment Constructions Limited (hereinafter referred to as M/s.CECONS) for removal of earth work which was to be done under its own supervision. It pleaded that the understanding between the appellant and M/s.CECONS was that if the performance was not satisfactory that M/s.CECONS would be removed from the scene and if the performance was found to be satisfactory, it might appoint M/s.CECONS as a sub-contractor after obtaining the approval of the Project Engineer. It was then pleaded that M/s.CECONS started the work and this was done openly which was also seen and supervised by the Project Engineer.

7. In short, the pleading was that the work was being done by M/s.CECONS at the instance of the appellant with full knowledge to the Project Engineer. It was pleaded that the Project Engineer raised no objections to this. However, in June, 2000, the General Manager (Technical-Project) while monitoring the progress of the said work noticed the presence of M/s.CECONS and objected to the said company performing the earth work and called for the explanation from the appellant. A letter was issued in July 2000 complaining the presence of M/s. CECONS and doing the earth work. Perhaps, as a result of this, the appellant removed M/s.CECONS from the scene by terminating its services in October, 2000.

8. The appellant further pleaded that thereafter, the respondent or any of its officer did not take any action against the appellant for the alleged handing over of the work to M/s.CECONS. It is pointed out further that the respondent also agreed to the recommendation of the Project Engineer for extension of time from 28-9-2001 to 31-1-200 2. It is further pleaded that perhaps because of the complaints made by the Member of Parliament, the respondent wanted to find some excuse to deny the award of the Contract Package No.NS-25(TN) which was almost a certainty because of the lowest bid offered by the appellant and, therefore, a show cause notice came

to be issued on 30-8-2001 where it was alleged that the appellant had entered into an agreement with M/s.CECONS which amounted to sub-contracting without the approval of the respondent though it was conceded that this arrangement was reported to have been discontinued after the notices were issued. It was alleged that by the action of sub-contracting, the appellant had violated Clause 7.1 of the terms and conditions of the contract and this was viewed seriously and it was proposed that the appellant should be debarred from the further award of work for the period of one year. The appellant was directed to explain within ten days as to why the action should not be taken. The appellant company gave a detailed reply to this on 31-8-2001 and explained its own stand. However, by order dated 22-10-2001, the whole bidding process was cancelled in respect of Contract Package No.NS25-TN while by order dated 31-10-2001, the appellant was debarred from participating in any bidding process, including re-invitation of bids even for the Contract Package No.NS-25(TN) in view of the non-adherence of conditions of contract by the appellant. The appellant was, therefore, challenging the aforementioned actions.

9. It was pointed out in the writ petition that there was voluminous record to suggest that firstly there was no sub-contracting and much less the same was not without approval. It was pleaded that the actions of black-listing and cancellation of the bids were patently illegal, hazardous and likely to cause prejudice to the appellant apart from being contrary to the terms and conditions of contract. The appellant even challenged the authority of the respondent to pass the debarment order. It was also pointed out that the action of cancellation of the bids would only result in enhancing the cost of the project. It was also suggested that the debarment action was not even bona fide as it was activated because of the complaint made by the Member of Parliament. The absence of opportunity to plead against the debarment action and the absence of proper reasons in the debarment order were also highlighted by way of the challenges.

10. On these pleadings, both the actions, to which we have referred earlier, were challenged before the learned single Judge.

11. The defence against these two petitions was that under Rule 7(1) of the Terms and Conditions of Contract, no sub-contracting could be done without the prior approval of the respondent. The respondent justified its action by suggesting that there was a patent breach of this clause and that the respondent was well within its rights to blacklist the appellant as also to cancel the bidding process in respect of Contract Package No.NS-25(TN). It was pointed out that an opportunity was given by way of a show cause notice and it was only after the overall consideration that the actions were taken and, therefore, there was nothing wrong in the said actions.

12. The learned single Judge accepted the defence and came to the conclusion that the appellant had entered into a contract with M/s. CECONS in contravention of clause 7 of the Terms and Conditions of Contract and, therefore, the respondent was well justified in firstly cancelling the bidding process for the Contract Package No.NS-25(TN) as also for

black-listing the appellant from entering into further tender process and for vying for the further contracts including the one for which the bidding process was on. It is this common judgment which is in challenge before us.

13. Learned senior counsel appearing on behalf of the appellant contends that the learned single Judge has completely ignored certain vital documents and the obvious and admitted facts while giving the finding that the appellant had entered into a sub-contract without the prior approval of the respondent. He points out that this factual position itself was not correct as the appellant had merely got certain works done (the earth work, etc.) from M/s.CECONS only on the experimental basis and in fact, there was no sub-contract created in the strict sense of the term. The further contention is that whatever work got done was extremely insignificant and in fact it is not as if the sub-contracting was completely barred so that any such exercise invited the extreme punishment of being black-listed as also the cancellation of the bidding process in Contract Package No.NS-25(TN) wherein the negotiations had almost come to an end and the formality of executing the contract alone had remained. The learned counsel further argued that being black-listed the appellant which enjoyed the reputation all over the world was a stigma and even if it was presumed that there was sub-contracting done without the prior consent of the respondent, it could not warrant the extreme punishment of being blacklisted and the cancellation of the bidding process in an entirely different contract. Learned counsel highlighted the contradiction that though the case of the respondent was that the terms of Contract Package No.NS-14(TN) were breached yet, that contract was allowed to be completed by the respondent and even a completion certificate was given for that purpose and yet, as a punishment of this firstly the bidding process of a completed negotiations in respect of the independent contract was cancelled on 22-10-2001 and as if that was not sufficient, the appellant itself was debarred. Learned counsel further points out that though the show cause notice proposed the black-listing of the appellant for a period of one year, the debarment order sounds as if it is a permanent one, there being no reference to the period of one year in the same. According to the learned counsel, this amounted to a vindictive, deliberate and a careless action. Learned counsel earnestly points out that there is practically no reason given why the bidding process in Contract Package No.NS-25(TN) was cancelled on 22-1 0-2001 because on that day, there was no debarment which only followed on 31-10-2001. Learned counsel points out that on 22-10-200 1, the appellant□s reply to the show cause notice was pending consideration. Therefore, the learned counsel says that it was apparent that for the alleged breach of clause 7.1 firstly, the respondent cancelled the bidding process of entirely an independent and a separate contract and thereafter proceeded to take the vindictive action of debarring the appellant. The learned counsel also urged that this was a contradiction in terms that though there was a alleged breach of terms of Contract Package No.14, the bidding process of Contract Package No.NS-25(TN) was cancelled first and the black-listing order was passed presumably keeping only that contract in mind. The learned counsel on the basis of the voluminous correspondence on record suggested that M/s.CECONS was doing the work openly and it was not a secret deal and that when it was objected to by the Project Engineer, the appellant removed M/s.CECONS from the scene but, even before that, the final supervision was that of the appellant on the contract work. According to the learned counsel, on the basis of the

objections taken somewhere in the mid of 2000, and after the appellant had removed M/s. CECONS from the scene, there are letters of the authorities to suggest that the appellant was merely admonished and cautioned not to repeat its action in future. On this backdrop, it was really strange that later on, the respondent should have chosen to take the punitive actions.
14. Learned counsel then urged that even if there was a breach of the terms of the contract, it did not call for such an extreme action and that the said action was completely uncalled for. Learned counsel

also urged that the real import on the various clauses in the agreement was not appreciated by the learned single Judge before writing the findings against the appellant.

15. As against this, learned senior counsel, Mr. V.T. Gopalan, while supporting the order of the learned single Judge urged that though there was no reference to the period of debarment in the impugned order dated 31-10-2001, it should be understood to be for one year only; secondly, the learned counsel very fairly stated that due to the interim orders by the court, there was no progress made in respect of Contract Package No.NS-25(TN) and in the meantime, even the period of one year was over and as such the appellant would be permitted to bid for that contract and, therefore, in fact, the writ petition in so far as it pertains to the debarment had become infructuous.

16. As regards the cancellation of the bidding process, the learned counsel says that it is an absolute right of the respondent to cancel the bidding process and merely because the appellant was the lowest bidder, it did not create any right in the appellant and that under the terms of the contract, the respondent was well justified in cancelling the whole bidding process. Learned counsel went to the extent of saying that there was also no necessity to give any reasons. Learned counsel supported the order of the learned single Judge holding that in fact, there was a full-fledged sub-contract in between the appellant and M/s.CECONS and the finding to that effect of the learned single Judge was correct. The learned counsel, therefore, submitted that once it was established that there was a sub-contract for which there was no prior approval or otherwise, the respondent was justified in taking action and the learned single Judge was also well justified in dismissing both the writ petitions.

17. As regards the contention raised that the action was vindictive, deliberate and malicious in law, which had emanated from the two complaints made by the Member of Parliament. Learned counsel submitted that though it was a fact that there were two complaints by the Member of Parliament, if the action of the respondent was found to be within its legal limits, there would be no question of any malice in law.
18. We were taken through the whole correspondence as also the findings recorded by the learned single Judge.

19. On these rival pleadings, we have to test whether the impugned actions in the writ petitions were valid in law and whether the

learned single Judge was justified in dismissing the writ petitions.

20. Learned single Judge has proceeded to hold that in its reply to the show cause notice dated 30-8-2001, the appellant had admitted that M/s.CECONS was engaged by the appellant and the machineries of M/s.CECONS were used and the personnel of M/s.CECONS were also employed for the work in connection with the ongoing contract by the appellant. The learned single Judge proceeds to hold that this amounts to an admission about the sub-contracting of the work by the appellant without "prior approval" by the engineer of the respondent, either orally or written, and, therefore, there was a violation of the terms of the contract and more particularly clause 7.1. This also seems to be the reason given in the impugned order dated 31-10-2001. The wording of the letter is peculiar and important in the following terms:
"Please refer to NHAI's letter No.NHAI/Tech/11020/6/99/792 dated 11-12-2000 informing you about prequalification of contractors of Phase_II works on North-South and East-West Corridors. M/s.P.T. Sumber Mitra Jaya is hereby debarred from participating in any bidding process, including re-invitation of bids for the above mentioned package, in view of non-adherence of conditions of contract by them i.e. subcontracting of work without obtaining prior approval of NHAI on an ongoing contract." (emphasis supplied)
Learned single Judge has also accepted that in view of this admitted position of violation of clause 7.1 of the terms of the contract, the holding of enquiry and affording an opportunity to explain the admitted facts were empty formalities without serving any purpose. Thus, in view of the so-called admission that there was a violation of clause 7.1, the learned single Judge proceeded to hold that there was no necessity of an enquiry also as to whether in reality there was a breach. The learned Judge has buttressed his reasoning by relying on the letter dated 7-9-2001, written by the appellant admitting that M/s.CECONS were engaged in January 2001 and since it was found that their performance was not satisfactory, their services were terminated in October, 2000. In short, these facts have been relied upon to arrive at a finding that the appellant admitted the entrustment of work to M/s.CECONS and thus also admitted the breach of clause 7.1 of the terms of the contract.

21. When we see the show cause notice dated 30-8-2000 that also alleges:
"... you (appellant) had entered into an agreement with M/s.CECONS, New Delhi, which amounted to sub-contracting, without the approval of the Engineer/Employer. This arrangement is reported to have been discontinued after notices were issued for getting the arrangement approved as per the conditions of contract. By this action of yours, you have violated clause 7.1 of the conditions of contract."
There is a letter on record dated 19-10-2001 by the Engineer/ Employer to the Project Manager of the appellant where a specific reference is made in the following terms:
"that as per clause 7.1 of General Conditions of the Contract – Vol.1 , the contractor may sub-contract any portion of the work up to a limit of 50% of initial contract price with "prior approval" of the Engineer/Employer ..."
(emphasis ours)
There is also a letter dated 4-7-2000 on record by the General Manager (Technical) to the appellant calling upon the appellant to speed up the work.

There is dissatisfaction expressed in this letter over the ground arrangements made by the appellant. It is also pointed out that the progress of the work was hopelessly slow and that no proper provisions were made for collecting and testing the materials to be used and that though the amount of Rs.2 crores was collected by the appellant towards the mobilisation advance for the procurement of plant and machinery, the machinery available at the site looked old and sick. There is a very significant observation made thereafter, which is in the following terms:

"It is noted that the work has been given on sub contract to M/s. CAPITAL EQUIPMENT CONSTRUCTION. It is informed during the formal chat that M/s. SMJ and CECON are Associates. So far NHAI has not been informed about the sub contract as per provisions contained under para 13 of Contract Data Clause 7 of CA (Volume 1). A sub contract can be done for the ceiling limit of 50% of the work with "prior" approval of NHAI. You may explain the circumstances under which the work was awarded to a sub contract without the approval of the NHAI." (The word "prior" is in hand-writing after scratching the typed word "proper")

There are other complaints made in this communication and lastly it is said:

"This letter may be treated as a letter of warning that the NHAI will not agree for a Time Run Over on account of your lapses. You are hereby advised to take it in a spirit in which the letter has been written so that you bestow all earnest efforts to make up and compensate the valuable time lost and thereby complete the project within the time schedule so as to recommend your organisation for taking up further project from NHAI during the forthcoming years."

22. This letter, it seems, is a sequel to the letter dated 14-6-20 00 wherein it is conveyed that it is understood that the works had been entrusted to M/s.CECON. It is then stated:

"In this connection it is requested to refer para 13 of Contract Data and Clause 7.1 of C.A. where in only 50% of initial cost price may be sub contracted."

The appellant was, therefore, requested to confirm necessary approval has been obtained from NHAI.

23. Lastly, in the letter dated 22-11-2000 also similar complaint has been made that there was no progress in the work and, therefore, a query is asked as to why the contract should not be terminated with penalty clause 60 of the Conditions of Contract.

24. From these few communications referred to above, the following facts emerge:

(1) That "Engineer" on the spot was aware of the presence of M/s. CECON right before 14-6-2000, in that the measurement book entries were also signed and endorsed regarding the work done up to May 2000 and this was the first caution cum notice to the appellant regarding the presence of M/s.CECON;

(2) that there was a dissatisfaction expressed regarding the speed of the work as also the progress thereof and the authorities insisted that though sub contracting of the work can be made up to 50% of the total work cost, for that there has to be a "prior approval" of NHAI;

(3) that even up to 22-11-2000, NHAI or as the case may be its Engineer was not happy about the progress of the work.

25. It is pointed out by the learned counsel for the appellant that after the letters dated 14-6-2000 and 4-7-2000, wherein this question of "prior approval" of NHAI for subcontracting of the work was raised along with the dissatisfaction over the progress of the work, the appellant removed M/s.CECON from the scene by the letter dated 24 -10-2001. In this letter, it is pointed out that the joint measurement for the work done by M/s.CECON up to 15-10-2000 had been already taken by the Team Leader Consultant of Rail India Technical and Economic Services Limited (RITES) in the presence of the Project Director, NHAI and that the final settlement would be made to M/s.CECON as per the terms of the agreement. M/s. CECON was also directed to hand over all the documents relating to the work at the site. A further letter dated 29-11-2000 was also written, which makes a reference to the letter dated 22-11-2000 in which complaints were made about the slow progress of the work, in which an assurance is given by the appellant to the General Manager (Technical), i.e. the Engineer on the spot of NHAI that the remaining work would be completed within the time-frame. In this, they also accepted the responsibility of noncompletion of the work within the stipulated time. Therefore, in so far as the year 2000 is concerned, there was no further correspondence as regards the issue of "subcontracting" without the prior approval of NHAI. It seems that the first explanation came to be given by the appellant, perhaps in response to the letter dated 31-7-2001, i.e. almost about nine months after it was directed by the Chief General Manager, copy of which is not on record. However, it seems that by that letter the explanation was called for regarding the presence of M/s. CECON on the work site. In the explanation offered by the appellant in its reply dated 3-8-2001, the appellant pointed out that M/s.CECON had offered their services to carry out the job along with the appellant and they were engaged for the earth work activity only to find their ability to go along with the appellant. It w as also agreed that their quality and quantity of the work would be reviewed at the end of three months period before proceeding further and that if there was no satisfaction over their performance, their agreement would be cancelled. The appellant further explains that there was to be an overall supervision of work by one Mr. Raj Kumar, Project Manager of the appellant company. It is then mentioned that at the end of six months, after finding that the earth work done by M/s.CECON only amounted to 4% of the work, the agreement was cancelled and they were settled in full. It was reiterated that even before this was done, the appellant had mobilised its machinery, material, etc. and the work was on full steam. Thereafter, it was pointed out that M/s.CECON would have been continued had it been found capable of performing and only thereafter the appellant would have approached NHAI for the necessary permission but the appellant never got that opportunity since the arrangement with CECON was terminated, finding their dismal performance. It is then pointed out that there was no subcontractor on the site and that even before that all the necessary mobilisation of the machinery was done. In this very explanation, the extent of the work done was informed and an extension of time of three months was sought for regarding this work.

26. Therefore, these communications do suggest that clause

7.1 was understood to mean that though the subcontracting was possible under this contract, it was possible:

1. with the approval of NHAI; and
2. such approval should be the
prior approval

27. On this backdrop, it will be better to see the specific language of clause 7.1 of the agreement. It reads as follows:
7.1. The contractor may subcontract any portion of work, upto a limit specified in Contract Data with the approval of the Engineer but may not assign the contract without the approval of the Employer in writting. Subcontracting does not alter the Contractors obligations.

28. In the definition clause of the conditions of contract, following clauses are extremely relevant. They are:

The Contract is the contract between the Employer and the Contractor to execute, complete and maintain the Works. It consists of the documents listed in Clause 2.3 below.

The Contractor is a person or corporate body whose Bid to carry out the Work has been accepted by the Employer.

The Employer is the party who will employ the Contractor to carry out the Works.

The Engineer is the person named in the Contract Data (or any other competent person appointed and notified to the contractor to act in replacement of the Engineer) who is responsible for supervising the Contractor, administering the Contract, certifying payments due to the Contractor, issuing and valuing variations to the Contract, awarding extensions of time, and valuing the Compensation of Events.

A Subcontractor is a person or corporate body who has a Contract with the Contractor to carry out a part of the work in the Contract which includes work on the site.

29. From the voluminous correspondence that is on record, it is obvious that while NHAI was understood to be the Employer, the Manager PIU is the Engineer.

30. A cursory reading of Clause 7.1 would suggest that the concept of subcontracting was not abhorred in this contract agreement. That was very much a concept in consideration and a presumable one also. In fact, subcontracting could be done to the extent of 50% of the work and that is the admitted position. However, a plain reading thereof would suggest that the contractor could subcontract the portion of the work up to a limit specified in the contract with the approval of the Engineer. the second deduction from

the language is that the contract could not be assigned without the approval of the Employer in writing and lastly, any subcontracting does not set the contractor free from the contractual obligations. The meaning is, therefore, clear:
1.In the first place, there is no user of the words □prior approval□ either in respect of the subcontract or in respect of the assignment of the contract.
2.Then, there is a definite difference in the concept of subcontracting of the portion of the work and assigning the original contract itself. While for subcontracting only the approval of the Engineer is required, for assignment of the contract itself, the approval of NHAI that too in writing, is necessary.

There is undoubtedly a dichotomy in the concepts of □subcontracting□ and □assignment of the contract□. It is, therefore, obvious that for such subcontracting, there would be no need of the approval of NHAI though unfortunately, the parties have understood otherwise.

31. We have already pointed out that the learned single Judge also deduced that firstly there was an agreement between the appellant and M/s.CECON and that the said agreement was without the prior approval of NHAI. Even presuming that there was any such agreement, in our opinion, there was no necessity of having a prior approval of NHAI as per the express language of clause 7.1. That could at the most be an agreement for subcontracting which would be undoubtedly an agreement different from the □assignment□ of the contract itself. The approval of the Engineer was necessary for subcontracting the work while the approval of the employer i.e. NHAI in writing was necessary for the assignment of the contract. The word □contract□ used in clause 7.1 has been defined in the agreement being the contract between the employer and the contractor to execute, complete and maintain the works. We cannot, therefore, equate the agreement to subcontract (even if it is presumed to have taken place in between the appellant and CECON) with the assignment of the contract itself. While, in the former case a mere approval of the engineer was necessary; for the latter the written approval of NHAI would be necessary. That is nobody□s case and unfortunately, clause 7.1 was read by the authorities very casually and generally and without noting the different functions of the engineer vis-a-vis the employer. It is for this reason that we have deliberately quoted extensively from the correspondence which flew from the engineer □ in this case the Manager-PIU and the respondent NHAI itself. Though the show cause notice was very guardedly given complaining of the absence of approval of the engineer/ employer, it is worth-seeing that there is no word □prior□ in this show cause notice and though this approval was to flow from the engineer, the word □ employer□ has also been introduced. However, in the impugned order dated 31 -10-2000 a specific reason is given of non-adherence of conditions of contract i.e. subcontracting of the work without obtaining the prior approval of NHAI on an on-going project. It is obvious, therefore, that there was a complete confusion on the part of the NHAI because subcontracting of work did not require firstly prior approval and secondly, the said approval was not

required of NHAI. It was only the approval of the engineer which was necessary. Learned single Judge has also not addressed the question from these angles which, in our opinion, were the necessary angles emanating from the language of clause 7.1. Instead, the learned single Judge has gone on to record a finding that it was an admission on the part of the appellant that the appellant had entered into a contract without the prior approval and that resulted in the breach of the clause. In view of the specific language, we cannot agree with the learned single Judge. On this issue, the question that would still remain is whether the exercise on the part of the appellant in getting some work done (admittedly 4% of the total work) and for that purpose entering into a contract with CECON without "prior approval" would amount to the non-adherence of the conditions of the contract. In our opinion, that by itself will not amount to the non-adherence of the contract. The finding of the learned single Judge as also the finding arrived at by NHAI on the issue of subcontracting thus are erroneous.

32. In fact, in view of this it will not be necessary for us to consider as to whether this subcontracting had the approval of at least the Engineer because that is not the case of the respondent. It is nowhere suggested in the impugned order of cancellation that the appellant had subcontracted the work without the approval of the engineer. Their case through out had been that there was a breach on the part of the appellant because there was no "prior approval" of NHAI (in contradistinction with "Engineer"). However, learned counsel for the respondent Mr. V.T. Gopalan tried to urge that the action was justified because there was no approval also of the engineer and the appellant had not pleaded or proved any such approval. Learned counsel suggested that considering the language of the clause, such approval was bound to be a "prior approval" but even if it is not to be taken as prior approval, at least subsequent approval should have been taken by the appellant. In our opinion, the contention is not right. The order of black-listing is for a specific ground of breach of clause 7.1 on account of entirely different reasons as we have pointed out. Now, at this stage, therefore, the respondent cannot be permitted to take a somersault and suggest some other reasons. It is well-settled now that if the justifying reasons for passing a particular order are found wanting on the plain construction of the impugned order then, the fresh reasons cannot be supplied later on. Therefore, it would not be permissible for the respondent to surprise the appellant by suggesting that even if the prior approval of NHAI was not taken, the appellant had breached clause 7.1 by not proving that there was an approval – prior or otherwise – obtained at least from the engineer for subcontracting. Even if the respondents are allowed to raise this plea, it will be seen that firstly the burden will be on the respondent to prove that there was a breach of contract on account of breach of clause 7.1. Even if we go to the extreme case of allowing the respondent to take up the extreme position yet, in our opinion, the respondent must fail for the reasons to follow.

33. It will be seen that the activity of CECON, the presence of its machinery, the work done by them was an open affair. It was not as if that work was being surreptitiously done and in deed the nature of the work was such that it could not have been done surreptitiously. CECON were engaged

to do the earth work by removing the trees, electricity poles, telephone posts, etc. or other stumbling blocks for which a heavy machinery was necessary. There is evidence on record in shape of the measurement books which were endorsed by the representative of the engineer. In this case, the engineer was a man on the spot and it was obvious that he was the watchdog for the work which was supposed to be done in pursuance of the contract. The signatures of his representatives on the measurement books prior to 14-6-2000 cannot be disputed and were in deed not disputed. It is only on 14-6-2000 that the subcontracting was taken note of by the engineer. The letter dated 14-6-2000 stands testimony to that. Another letter dated 4-7 -2000 was written because of the slow progress of the work. After all, this was an ambitious project conceived by the Hon□ble Prime Minister and, therefore, the importance of the work was enormous. Noting the slow progress, the second letter seems to have been written on behalf of General Manager. The tone of the letter is that NHAI was not happy at all with the progress. Even in that letter, a completely incorrect position has been taken up that a subcontract could be done to the extent of 50% of the work with the prior approval of NHAI. By these letters, the appellant was required to explain the circumstances under which the work was awarded. Till this time, there was no disapproval by the engineer concerned. It is liable to be seen that first letter is written by Team Leader of RITES while the second letter is written by the General Manager of NHAI. There is no letter or disapproval by the engineer on the spot. Perhaps, as a result of these letters dated 14-6-2000 and 4-7-2000, the appellant proceeded to remove CECON from the scene perhaps by terminating the agreement of subcontract. This seems to have been done on 24-10-2000. There is a letter fired by the Project Director who was the engineer on the spot dated 22-11-2000. This is also a letter in which a complaint was made of the slow progress of the work. Not only this but a specific caution was given in the couched language that for this fundamental breach of contract as per clause 59 of the conditions of the contract, the contract could be terminated. Very strangely, there is not even a whisper about the so-called breach of clause 7.1 in this. This was probably because the appellant had already removed CECON from the scene by terminating the agreement with CECON. This silence on the part of the Project Director/Engineer is rather telling. The appellant immediately responded this letter dated 22-11-2000 by accepting that they could not perform as per the schedule and also accepted the responsibility therefor. However, they undertook to complete the work to the full satisfaction of NHAI. Very significantly there is nothing on record before us to suggest that the engineer either conveyed the disapproval or the alleged breach of clause 7.1 right till July 2001, that is for full one year. There is a reference to the letter dated 31-7-2001 by the Chief General Manager which has not been produced before us but, it appears that in that letter the subject came to be broached regarding this subcontract. The letter dated 3-8-2001 by way of reply to this letter dated 31-7-2001, bearing No.NHAI/CGM(C)2001, suggests that though the services of CECON were utilised to begin with, they were to be on experimental basis and after dissatisfaction regarding their performance, they were removed from the scene and, therefore, there was no question of prior approval of NHAI. It is rather surprising that it is only after one full year that this subject came to be broached during which admittedly the work on the contract was in progress. Not only this but NHAI had also invited

the appellant for two/three other works one of them being the extension of this very work, which was going on. There is a letter on record dated 19-3 -2001 acknowledging that for the Contract Package No.NS-25 TN, the appellant was accepted to be the lowest bidder and was invited for presentation, etc. There is also a letter of acceptance on record accepting the bid offered by the appellant in respect of one other work in the State of Orissa. Therefore, it was obvious that there was not even a murmur by either the engineer on the spot or NHAI for full one year or at least nine months after they were informed that CECON were removed from the scene.

34. In this period of one year or as the case may be ten months, there are two significant letters dated 11-4-2001 and 4-5-2001. They are by the Member of Parliament, Thiru Selvaganapathy. The first is to the Chairman, NHAI and the second letter is addressed to the Hon ble Minister of State, Road Transport and Highways. In the first letter, the slow progress of the work is complained of. In the second paragraph it is complained that the work was sublet to two or three contractors and yet no penal action was taken by NHAI against the appellant. It is then complained that the appellant was merely a middlemen or a broker having no credit facilities in India and they produced the bank guarantees only by the subcontractors and thus they did not have any financial stake in the contract. It is stated at the end of the letter that it was because of this that the appellant did not bother about the progress or completion of the project and in that view, it is finally said:
In the light of the above please look into these matter in detail and take necessary action to terminate this agency immediately and make alternative arrangements for completing the balance works at once, so that the widened road is put into beneficial use quickly.

The second letter which is directed to the Hon ble Minister is also of the same nature wherein it is suggested that instead of taking action against the appellant, NHAI was gifting them with the further more new works when they were eligible for disqualification under clause 4.8 of ITB (it is not known as to what was meant by ITB). It is then pointed out that the appellant had sublet the hundred per cent work to CECON by keeping 6% commission and later on they terminated CECON without settling their dues and payments and they sublet the same work to a Nagpur-based company and acting like a foreign commission agent between NHAI and Indian contractor. It is pointed out that hundred per cent subletting was in violation/breach of agreement with NHAI. A further complaint is made that though the mobilisation advance of Rs.2 crores against the NS-14 work was deposited, the said funds were being utilised by the appellant for their personal wealth and earning interest out of it.
Further complaints are made regarding the slow progress of Karur Bye-pass road which was also sublet to Mahendira Construction Limited and also the fact there was no machinery in the name of the appellant. The letter then proceeds to mention:
Even after my personal reference and letter to the competent authority no significant improvement on the works nor any action has been taken for termination of SMJ and my letter was completely ignored.
Lastly it is stated that NHAI was contemplating the other three works worth Rs.50 crores, Rs.140 crores and Rs.75 crores respectively and, therefore, the appellant should be terminated without any hesitation from the works and they

should not be considered for the three new projects and for any more new tenders. It is then said:

"My repeated references and letters should be considered with right spirit in the interest of the public and to avoid any unpleasant situation, request your personal intervention for the same."

It is, therefore, obvious that it is only after these letters that the action of black-listing of the appellant was commenced.

35. There can be no doubt that the Hon'ble Member had written the letters in the public interest. However, before initiating any action thereupon, the respondent was bound to enquire into the allegations made and then should have proceeded on the correct interpretation of the clause. We have already pointed that the respondent's actions suffered from complete misunderstanding the implications of the agreement. In the counter-affidavit paragraph 10 would suggest that the concerned authorities knew of the presence of CECON way back in January/February 2000 and they were not happy with the progress of the work and, therefore, ultimately CECON came to be removed and that in pursuance of the notice issued by the General Manager, CECON came to be removed and there the matter had almost ended. A very significant sentence appears in this paragraph, i.e.:

"On enquiry, the Deputy Project Manager of the Contractor explained that M/s.CECON is their associate for equipment andlabour supply. this being allowed, as per contract, the contractor was allowed to proceed. ... On enquiry, the Deputy Project Manager of the petitioner, however, informed that he is still responsible for supervision. That was not agreed to. The contractor was issued a notice by the Team Leader (Engineer's representative) on 14-6-2000."

Even in this paragraph, NHAI had taken a completely incorrect position that the approval of NHAI was required for subcontracting. It is, however, noteworthy that it is an accepted position in this paragraph that the removal of CECON from the scene was also noted before which the appellant was allowed to proceed. In their affidavit also, it is an admitted position that specific enquiries were made as regards the complaints made by Thiru Selvaganapathy. It was only thereafter that the explanation was sought and then it was decided to issue a notice.

36. All this suggests unmistakably that the man on the spot, i.e. the Project Engineer was all through aware of what was going on and since CECON were removed from the spot, subcontracting was not at all viewed seriously instead for one full year the appellant was continued to proceed with the work and during this time, the appellant was also invited, if not awarded, to bid for three more contracts. It is difficult for us to imagine that this suggests a disapproval on the part of the concerned engineer. In fact, this was nothing but a tacit approval and even the authorities seemed to have been satisfied after M/s.CECON were removed from the scene. We have already explained that we do not have to go into this question of the approval by the engineer for the simple reason that it is not the stand of the respondent that it was because of the absence of approval by the engineer that the action emanated. All through the stand has been that the action has started because of the absence of the prior approval on the part of NHAI. In our opinion, this stand was completely incorrect.

37. As if all this was not sufficient on 16-8-2000, the appellant was requested to extend the period of bid which they made for Contract Package No.NS-25(TN). Even after the show cause notice was fired by the respondent and the reply was sent, the respondent again asked the appellant to extend the period of bid in respect of the other contract by its letter dated 19-9-2001. Two letters, one dated 19-1 0-2001 and another letter dated 29-10-2001, are also extremely significant. They have already been referred to by us. All that was stated about the breach of clause 7.1 was that any violation against the provisions would be viewed seriously by the authorities. By that letter, the appellant was instructed to adhere to the conditions of the contract in respect of the on-going project No.NS-14(TN). This letter is written by the engineer though obviously the reading made about the language of clause 7.1 in this letter is obviously incorrect because of the appearance of the words "prior approval". It remains to be seen that there is nothing imputed in this letter to the appellant that they had in any way breached clause 7.1. In the second letter, which has also been written by the engineer to the Chief General manager, NHAI, the engineer has reiterated very specifically about the engagement of the subcontractor and it is further said that the appellant was asked to furnish the details of subcontracting "if any" during the initial stage of the project. A reference is given to the letter written in June 2000 (probably 14-6-2000). It is further reiterated that the appellant had replied that they had not engaged any subcontractor but engaged CECON as their associate for providing machinery and equipment on lease basis to do the earth work activity which was permitted as per the contract agreement [Instruction to Bidders Section 1-A Cl.4.5 B(a)] and that the contractor had also informed that if CECON achieved the progress of the earth work activity to the desired level, it might have engaged CECON as subcontractor after seeking the prior approval from NHAI. It is then pointed out that since the work was slow, a notice was given to the contractor in the month of September, 2000 and as a result, the contractor removed CECON from the site and started mobilising their own manpower, machinery, etc. for the speedy implementation of the project. It is then lastly suggested that since it was the bound duty of the contractor to intimate and get approval from the engineer/employer for any subcontracting of the work as per clause 7.1 of Conditions of Contract, the contractor was given strict instructions to adhere the conditions of work "in case of subcontracting in future". We have deliberately quoted extensively from the letter dated 29-10-2001 because even here there is no specific disapproval. On the other hand, the tone of the letter is that in future the contractor should not subcontract the work without the approval.

38. From all this, we are unable to see any disapproval on the part of the engineer even subsequent to the aforementioned enquiries. On the other hand, the totality of the reactions by the respondent and more particularly the engineer thereof do go to show that though the engineer was in the know of the work being done through CECON, that was objected to by the engineer seeing the slow progress and immediately after the removal of CECON from the scene on the objection having been raised, there was no question of taking the approval as the moment disapproval was shown, the contractor had complied with. The situation, therefore, comes to this that 4% earth work was done which the engineer on the spot was fully aware. He did not object to it

till he found that the work was very slow and as soon as he complained against the slow progress of the work, the concerned subcontractor, if he can be so called, was immediately removed from the scene and the contractor started doing the work on his own. Under such circumstances, could it be said that there was a breach of clause 7.1. Through out the position was taken by the respondent that it should be a prior approval and we have already shown that the prior approval, that too of NHAI, was never necessary. All that was necessary was an approval of the engineer, who was obviously a man on the spot, and it was in his presence that the work was being done and when the subject of subcontracting was broached, CECON was removed from the scene.

39. In a reported decision in U.P. AVAS EVAM VIKAS PARISHAD AND ANOTHER v. FRIENDS CO-OP. HOUSING SOCIETY LIMITED AND ANOTHER (AIR 1990 SC 114) this question regarding "prior approval" was considered by the Apex Court. Following lines from paragraphs 4 and 5 would be apposite:

"It is to be seen that the language employed therein is that the approval of the State Government is necessary. Question is whether it would be prior approval or approval given subsequent to the notification under S.28 or declaration under S.32 is valid in law. If prior approval would have been a precondition for further steps, the Act would have said so. This not having been done, it seems to us what is material is to obtain approval of the State Government. ..."

In paragraph 5, the Supreme Court, relying upon the observations in LIFE INSURANCE CORPORATION OF INDIA v. ESCORTS LIMITED (AIR 1986 SC 13 70), observed:

"Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous act. As to the word "approval" in S.33(2)(b) of the Industrial Disputes Act, it was stated in Lord Kirshna Textiles Mills Ltd. v. Workmen (AIR 1961 SC 860) that the management need not obtain the previous consent before taking any action. The requirement that the management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in S.33(1)."

The abovementioned paragraph seems to have been endorsed by the Supreme Court from the judgment of Sir Shah Sulaiman C.J. in Shakir Hussain v. Chandoo Lal (AIR 1931 All. 567).

40. The situation is no different here. We have already pointed out that what was required under the agreement was a mere approval of the engineer and the voluminous correspondence on the record, which we have shown, do suggest that the action on the part of the appellant in getting some insignificant work done through CECON was not disapproved. On the other hand, the bills were passed on the work done by the respondent for which there are entries in the measurement books. However, when the subject was broached, since CECON was removed from the scene, there was no question of any subsequent approval. That was already there in the tacit form because otherwise, the engineer would not have passed the bills. Since CECON were removed from the scene, there was no question of then seeking any formal approval.

41. In LIFE INSURANCE CORPORATION OF INDIA v. ESCORTS LIMITED (AIR 1986 SC 1370), in paragraph 63, the Supreme Court observed that the absence of the word "previous" in Sec.29(1) of the Foreign Exchange Regulation Act suggested that the legislature wanted to invest the Reserve Bank of India with certain degree of elasticity in the matter of permission to the Non Resident Companies to purchase shares of Indian companies. The situation is again no different here because the engineer on the spot had to have a certain degree of elasticity in the matter of controlling the contract work as he was the man on the spot. In our opinion, therefore, there was no question of any prior approval in this case on the facts which we have shown and discussed.

42. The argument of the learned senior counsel for the respondent was that we should not look into the merits of the order or the reasons in support of black-listing the appellant. Very heavy reliance was placed by the learned senior counsel for the respondent on the reported decision of the Supreme Court in GROSONS PHARMACEUTICALS (P) LIMITED v. STATE OF U.P. (2001 8 SCC 604). Our attention was drawn towards the observations of the Supreme Court in paragraph 2 of that judgment, which is to the following effect:

"It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principles of audi alteram partem which is one of the facets of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant was based was not the requirement of the principle of audi alteram partem. It was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. ..."

Heavily relying on this, learned senior counsel pointed out that in this case also, there were no statutory rules and once the opportunity was given to show cause against the proposed blacklisting, there was no question of finding fault with the concerned authority for the action taken. Learned single Judge has also heavily relied on this judgment.

43. In our opinion, this judgment more or the less turns out on its own facts. There, the contractor had committed an offence by doing irregularities in the purchase of medicines. Not only this, but the prosecution was also launched against the contractor under the provisions of Prevention of Corruption Act read with Sec.120 IPC. It was under those circumstances that the Government served a notice on the contractor to show cause as to why it should not be blacklisted. Records were seen by the High Court where the action of blacklisting came to be challenged as in the initial stages no opportunity was given which opportunity came to be given only by way of an earlier Special Leave Petition. The High Court which went into the subsequent blacklisting action ordered by the State Government, after the remand from the Supreme Court, had found that elaborate reasons were recorded before the order of blacklisting was passed. It is under these circumstances that the observations came to be made. A complaint was made in this decision on behalf of the contractor that all the materials on the basis of which the charges against the contractor were based were not supplied along with the show cause notice and in the absence of such materials, the order was against

the principles of natural justice. We repeat that the observations came to be made on the backdrop of these contentions. Such is not the situation here. There was no question of any fraud, corruption or any criminal offence involved in this matter. All that had happened was that some insignificant percentage of work was given to someone else, not in a surreptitious manner but openly for which the engineer on the spot not only knew but also approved by passing the bills therefor. The two situations are entirely different. There was a complete inaction for one full year on the part of NHAI or the engineer on the spot. On the other hand, in that one year, new works were assigned to the appellant; their bids were accepted for other contracts; they were certified as the lowest bidders and were invited for the further discussions, etc. On this backdrop, when all of a sudden a complete somersault is taken and a very serious action, inviting civil consequences, was taken of blacklisting the appellant permanently (at least that is the import of the impugned order), it cannot be said that the action of blacklisting was in any manner correct.

44. Very strangely it was contended before us that NHAI has no rules regarding blacklisting of the contractors. When specifically asked, it was contended that the Central Public Work Department Rules (in short CPWD Rules), which ordinarily deal with the construction contracts relating to Central Government, were not adopted. We have seen the CPWD Rules. In those rules, which appear at appendix 53, rule 2 3.3 speaks about the removal of the contractor from the approved list. There are twelve reasons given which include, habitual failure to execute the contract; constructional defects in two or more works; persistent violation of any important conditions of the contract; failure to abide by the conditions of enlistment; giving false particulars at the time of enlistment; indulging in forgery or falsification of records; change of constitution of the firm without prior approval; change of permanent address without intimation; being declared as bankrupt or insolvent, etc. We do not find even one of these reasons. Could then be said that the respondent was justified in blacklisting the appellant on the flimsy and a non-existent ground on a complete misunderstanding of the language of clause 7.1? Though these rules are stated not to be applicable obviously these rules can be seen as a model rules for the purpose of guidance for deciding as to on what grounds could there be an extreme action like blacklisting. The punishment of blacklisting of a contractor as has been found by the Supreme Court in ERUSIAN EQUIPMENT AND CHEMICALS LIMITED v. STATE OF WEST BENGAL (AIR 1975 SC 266) and JOSEPH VILANGANDAN v. THE EXECUTIVE ENGINEER (PWD) ERNAKULAM and even in a number of decisions after that to be a drastic action. In Joseph Vilangandan case, cited supra, the Supreme Court observed:

Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair-play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

We, therefore, fail to follow as to how an extreme penalty of blacklisting of the appellant could follow that too out of the total misinterpretation of the concerned clause.

45. In this behalf clause 59 of the Conditions of Contract speaks for termination of the contract for various reasons. Obviously, there is no such reason and the present reason given in the impugned order is certainly not one of them. In that behalf, it is significant to note further that the on-going contract was not terminated. The contractor was allowed to complete the contract without even a slight murmur on the part of either the engineer or NHAI. NHAI went to the extent of even extending the time limit of the on-going contract. It is in the wake of this factual backdrop that strangely NHAI decided to blacklist the appellant permanently. Under no circumstance, could this be a justifiable reason for blacklisting the appellant. From all this, it can be said that the action on the part of NHAI to blacklist the appellant was obviously an arbitrary and unreasonable action. We do not agree with the learned single Judge as we have already shown that the learned single Judge has not addressed the problem in the wake of the aforementioned circumstances and the proper interpretation of clause 7.1.

46. By way of a desperate argument, it was submitted that the writ petition itself was not maintainable as this was in respect of a non-statutory contract and, therefore, this Court should be slow to interfere under Art.226. The argument is obviously incorrect. Firstly, when we are deciding the order of blacklisting, it does not merely remain to be a matter of contract. As has been explained by the Supreme Court in catena of decisions, an action of blacklisting brings in with it the civil consequences apart from stigmatising the contractor, who is blacklisted. The reported decisions relied upon by Shri V.T. Gopalan in the matter of □Government contracts□ are of no use for the simple reason that in this case, the contract was not tinkered with. On the other hand, the contract was allowed to go on and, therefore, this is not a dispute regarding the contract. This is essentially a dispute regarding the stigma caused on account of flimsy and nonexistent reasons based on a completely incorrect interpretation of clause 7.1. This action also brought stigma to the appellant and, therefore, it could not be said that the writ petition itself was not maintainable. We reject the argument.

47. Then it was pointed out that the Court should interfere only where the □public interest□ was involved when it came to interfere with the Government□s discretion in respect of non-statutory contracts. We have already clarified above that this was not a simple question of terminating the contract or accepting or non-accepting a tender. Here is an order which stigmatised the appel lant permanently. We have already clarified that this shows a total non-application before taking a drastic action like blacklisting of the appellant permanently. A subsequent assurance given in the Court that the action was meant only for one year would really be of no consequence in the wake of specific language of the impugned order of blacklisting. From the language at least, it appears that blacklisting is permanent.

48. For the reasons above, we cannot brook the action of blacklisting of the appellant in the order dated 31-8-2001 and we would choose to quash that order. The order of the learned single Judge in so far as it pertains to the blacklisting of the appellant is set aside and the appeal (W.A. No.1026 of 2002) is, therefore, allowed.

49. This takes us to the consideration of the other writ petition wherein the appellant had challenged the cancellation of the bid by the order dated 22-10-2001. The contention raised here is that once the action of blacklisting is quashed, the bidding process which was going on in respect of Contract Package No.NS-25(TN) would automatically be restored and the process where it was stopped should start at that very level. We are unable to accept this contention.

50. The bidding process was going on about one and a half years back. It will be seen under the tender conditions, the respondent had an absolute right to reject any bid at any stage. True it is, that cannot be done in an arbitrary or capricious manner. However, the absolute right on the part of the respondent to reject the bids without assigning any reason cannot be disputed by anybody, even by the appellant, who was invited to discuss the further bids. In fact during the course of arguments, Shri V.T.Gopalan very fairly contended that the period of blacklisting was only one year though it was not so stated in the impugned order. This is said perhaps on the basis of the language of the show cause notice. Even before the debate began, learned counsel pointed out that the whole bidding process was cancelled and in the fresh notification, however, the appellant would still be allowed to take part in the bidding process. We have pointed out that considerable period has been lost. Therefore, the significance of the offer at that time has also been lost. It was tried to be suggested that the bids had to be kept alive and that was done only at the instance of the respondent. That may be so. That by itself will not give any right to the appellant to insist upon the very same old bidding process to be perpetuated. The clock cannot be put back. We would, therefore, not interfere with the order dated 22-10-2001, cancelling the bidding process in respect of Contract Package No.NS-25(TN). We only say that by the elapse of time, the significance of the old bidding process has already been lost. It is again an admitted position that now presently the bid of the appellant is not alive and for that purpose, there is no extension of the bidding process by the bankers of the appellant. We do not, therefore, wish to put the clock back and rejuvenate the whole bidding process.

51. It will be seen that what was cancelled was a mere bidding process. That had not in any way fructified in to a contract. The theory of □legitimate expectation□, which was distantly tried to be relied on, will also not work because it is clear from the terms and conditions that the respondent had an absolute right to accept or reject any bid without assigning any reason. This is one more reason why we are not inclined to interfere. We would, therefore, confirm the order of the learned single Judge in so far it relates to the impugned order dated 22-10-2001 and dismiss the appeal (W.A. No.1027 of 2002).

52. In the result, W.A. No.1026 of 2002 is allowed and W.A. No.102 7 of 2002 is dismissed but, under the circumstances, there will be no order as to the costs in both the writ appeals. Connected W.A.M.Ps, if any, are closed.

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